The Malayan Law Journal

1956

Reports

AHMAD & SONS v. KALIAPPAN; KOK MUN RESTAURANT v. CHIN SAM MOY (f); YIN v. LEE WAN SENG & ANOR.

[A.C.J. (Thomson J.) September 30, 1955]

[Ipoh — Civil Appeals Nos. 12, 13 & 14 of 1955]

Landlord and Tenant — Control of Rent Ordinance, 1948, ss. 2, 3, 6, 8, 9 & 16 — Powers of the Rent Assessment Board.

These were appeals on a point of law from the decisions of the Ipoh and Menglembu Rent Assessment Board. The facts in the first case were that prior to the present proceedings the rent of the premises in question was $90 a month. Prior to January 1, 1955, the annual value of the premises for renting purposes was assessed at $1,080, but as from that date the Town Council increased the rateable value to $1,560. On February 8, 1955 the solicitors for the landlord, addressed a letter to the tenants giving them notice to quit on March 31, 1955 and stating that application was being made to the Rent Assessment Board for leave to increase the rent to $130 a month. An application was subsequently made to the Board. At the hearing the only evidence produced was that the Town Council had increased the assessed annual value of the premises from $1,080 to $1,560. The Board ordered that the rent be $130 per mensem with effect from April 1, 1955. The facts in the other two cases were *mutatis mutandis* the same.

In all three cases the tenants appealed on the grounds that there was a complete failure by the Board to exercise its discretion, that the Board failed to exercise its discretion judicially and that the Board failed to pay due regard to the provisions of s. 6(1)(c) of the Control of Rent Ordinance.

Held: (1) the Board had no power to qualify its orders in any way by suspending their operation or as was done in the present case, by making them retrospective; (2) there are no limitations in the Ordinance on the powers of the Board to fix the rent and provided that the Board complies with the provisions of the Ordinance relating to interested parties being given an opportunity to state their case and to produce such evidence as they may see fit, and in the absence of any allegation of want of good faith the orders of the Board cannot be successfully challenged on appeal; (3) in the present cases there was nothing to show that the Board had gone outside its powers or had acted otherwise than judicially in coming to its decision and therefore the appeals against the orders fixing the rent must be dismissed.

Cases referred to in the judgment:—

(1) *Griffiths v. Davies* (1943) 1 K.B. 618, 621.

(2) *Labrooy & Ors. v. S. M. Sharma* (1951) M.L.J. 127.

CIVIL APPEAL.

S. P. Seenivasagam for the appellants — Asked for leave to amend Grounds of Appeal to effect that Order is *ultra vires* because the Rent Assessment Board had no jurisdiction to make an order fixing rent retrospectively. (**Shuttleworth** — No objection).

Board failed to exercise any discretion at all in fixing rent. In effect they are just following the Town Council. Control of Rent Ordinance, s. 3 makes it unlawful to increase rent without permission. Board's powers are in s. 8(1)(b). This power is discretionary and must be exercised judicially. In following Town Council they are not acting judicially. Question of increase is dealt with by s. 6(1)(c). Annual rate 21% of assessed annual value. Under old assessment landlord had to pay $266.80. After increase he will have to pay $327.60. Craies on Statute Law p. 252. Board did not apply its mind to the question but blindly accepted valuation by Town Council. **The King v. London County Council** (1918) 1 K.B. 68, 73. As to retrospective effect of order Board has no power to say from what date the new rent shall operate. It only has power to fix the rent. The landlord must move to increase the rent. See s. 6(2). As to position of statutory tenants he referred to s. 16. Under s. 16(b) notice is necessary before rent of statutory tenant is increased. As to retrospective order he refers to **Labrooy v. Sharma**(2). He is not saying that there is any absolute ceiling to the power to fix rents provided it is exercised judicially.

C. W. Shuttleworth for the respondents. The only evidence before the Board was assessed annual value of the property. Powers of the Board dealt with in s. 8. Here appellants produced no evidence whatever. Board came to only possible conclusion on the evidence before it. Application to Board made under s. 8(1)(b). He says Board should not increase beyond limits of s. 6(1)(c). But under s. 6 landlord can himself increase rent without reference to Board. Under s. 6(1)(b) Board can still permit increase. Only reported case is **Tan Ah Seah v. Teo Kai Min & Ors.** (1954) M.L.J. 50, 53. He would refer to the Singapore position. S. 8(1)(b) same as s. 9(1)(b) of Singapore Ordinance of 1947. In 1953 new Ordinance was enacted in Singapore. This added a proviso to s. 9(1)(b). Appellant is trying to inject a similar proviso into our Ordinance. As to the retrospective nature of the order he agrees that Board should only fix the rent. But he does not agree that this action of the Board makes the whole order *ultra vires*. The order is otherwise good.

Seenivasagam: It is duty of applicant to provide evidence beyond evidence of the opinion of the Town Council. Only ground was that valuation had been increased.

Cur. Adv. Vult.

Thomson J. : — These three appeals are appeals on a point of law from decisions of the Ipoh and Menglembu Rent Assessment Board. The point involved in each of them is the same and with the consent of the parties all three were heard together. I understand that they are of the nature of test cases and that the result of them may affect the position of many hundreds of landlords and tenants in the Ipoh and Menglembu Town Council Area.

In all three cases the facts are simple and have at no time been in dispute.

In Civil Appeal No. 12 of 1955 the appellants are the tenants and the respondent is the landlord of premises at No. 74 Belfield Street, Ipoh, which are subject to the provisions of the Control of Rent Ordinance. Prior to the commencement of the present proceedings the rent of the premises, which were held on the usual type of monthly tenancy, was $90 per mensem. Presumably that was a lawful rent but there is nothing on the record to shew whether it was the "standard rent" of the premises or the "standard rent" increased in terms of the Ordinance. In any event, it was the rent which was being paid and received and for a reason which I will indicate later is to be treated as the current rent for the purposes of the Ordinance.

Prior to 1st January, 1955, the annual value of the premises for rating purposes was assessed at $1,080. But as from that date the Town Council increased the rateable value to $1,560. On 11th December, 1954, the landlord addressed a letter to the tenants which is not in evidence but which apparently demanded that the tenants should in future pay rent at the rate $130 per mensem. The tenants quite properly refused to comply with this demand (which if it was made as stated was unlawful) and on 8th February, 1955, solicitors for the landlord addressed a letter to the tenants giving them notice to quit on 31st March, 1955, and stating that application was being made to the Rent Assessment Board for leave to increase the rent to $130 per mensem. An application was made to the Board in this regard on 10th February, 1955, and this came on for hearing before the Board on 26th May. At that hearing the only evidence produced by either party was that the Town Council had increased the assessed annual value of the premises from $1,080 to $1,560 and the landlord made it quite clear that that was the only ground on which the application was made. In the event the Board ordered :—

"That the rent shall be at $130 per mensem with effect from 1st April, 1955."

and the President subsequently certified that the grounds of the Board's decision were as follows :—

"The Board considered that the rent to be paid for any premises should be tied to the Annual Value of those premises and ordered accordingly. It was considered equitable that any increase granted should be effective from the first day of the month following the date of the application to the Board."

In Civil Appeals Nos. 13 and 14 the facts and the course of the proceedings were *mutatis mutandis* the same.

In all three cases the tenants have now appealed on the grounds that there was a complete failure by the Board to exercise its discretion, that the Board failed to exercise its discretion judicially and that the Board failed to pay due regard to the provisions of section 6(1)(c) of the Control of Rent Ordinance thereby in effect nullifying those provisions.

Before approaching the questions at issue in the appeals it will be desirable to consider the history and present state of the law relating to the control of rents in general and the powers of Rent Assessment Boards in particular.

Prior to 25th September, 1940, there was in force no legislation on the subject but with effect from that date the Legislature enacted the Rent and Charged Land (Restriction) Enactment, 1940, (No. 14 of 1940). That Enactment provided for the constitution of Rent Assessment Boards and provided that it should be unlawful for any landlord to increase the rent of any premises over that being paid at the date of its commencement without an Order of the appropriate Board in that behalf. It went on to provide that on the application of any landlord or tenant the Board might make an Order fixing the rent of premises which might be an increased rent and which was not in any event to be less than the lowest rent at which the premises had been let not less than six months prior to the commencement of the Enactment. It was further provided that in fixing the rent of premises completed after the commencement of the Enactment the Board was to fix a rent which in its opinion would give a reasonable return for capital reasonably expended.

The 1940 Enactment was repealed and replaced with effect from 31st January, 1948, by the present Control of Rent Ordinance (M.U. No. 6 of 1948). That Ordinance, which is entitled "An Ordinance to amend and re-enact the law relating to the control of rents and matters incidental thereto" was to continue in force for one year only but, by virtue of a provision contained in it, it has been renewed annually for succeeding periods of one year by resolutions of the Legislative Council. It has been subsequently amended by Ordinances No. 61 of 1949, No. 5 of 1952 and No. 17 of 1955 and is still in force. It is to be noted that it has no application in the case of new buildings completed after the date of its commencement.

The provisions of the Ordinance as amended relating to rent in so far as they are relevant to the present appeals may be summarised as follows.

Section 2 defines the expression "standard rent" The "standard rent" of premises is the rent fixed by the Rent Assessment Board under the provisions of the 1940 Enactment or, if no such rent was fixed, then the rent of the premises as at 25th September, 1940, (which it will be remembered was the date of the commencement of the 1940 Enactment) or, in the case of premises which at that date were unlet, unoccupied or

unbuilt, the rent at which such premises were first let after that date.

Section 3(1) provides as follows :—

"Save as hereinafter in this Ordinance provided, it shall be unlawful for any landlord to increase or attempt to increase or to receive or recover a rent in respect of any tenancy of premises in excess of the rent fixed by an order of the Board, or, if no order has been made, in excess of the standard rent."

In this section the expression "order of the Board" must necessarily refer to an Order of the Board made after 31st January, 1948, for any rent fixed by an Order of the Board under the 1940 Enactment is by definition included in the expression "standard rent." It may be that in view of the provisions of section 6, to which I am just coming, this was not intended but I fail to see how the words can be capable of any other meaning.

Then I pass to section 6 which provides that "it shall not be unlawful for a landlord" to increase the rent of premises let by him up to the standard rent or the rent fixed by an Order of the Board where the current rent is below either of these rents or, in the case of premises which were let on or before 25th September, 1940, and in respect of which there has either been no increase of rent after that date or an increase of less than the full amount permitted by the Ordinance, to increase the rent in accordance with the provisions of the First Schedule which provides for increases to the extent of certain specified percentages or of any increase in the local rates whichever be the greater. This provision of section 6(1) is subject to the following proviso :—

"Provided that the Board may in any such case, on the application of the landlord or the tenant, make an order fixing the rent, and in such event the landlord shall not increase the rent above the rent so fixed."

It is also subject to the provisions of sub-section (2) which reads as follows :—

"Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent."

The only comment I have to make on section 6 at this stage is that although the expression "current rent" is nowhere defined I think it must be taken as meaning the rent which is actually being paid. I am not unmindful of the observations of Lord Greene M.R. in the case of *Griffiths v. Davies*[1] where in a somewhat different connection His Lordship held that "current rent" must mean whatever rent is legally exigible under the contract of tenancy as modified by the terms of the Rent Restriction Acts rather than the rent which was actually being paid. This construction, however, is to my mind, ruled out here by the wording of the section which clearly uses the expression in relation to rents which are below the standard rent or the rent fixed by Order of the Board as the case may be and which are therefore *ex hypothesi* lawful.

Then I come to section 8, the side-note to which is "Powers of Board". Logically a consideration of this section should commence with sub-section (3) which provides that any landlord or tenant or other interested party "may apply to the Board for an order fixing the rent in respect of the tenancy of premises" in which he is interested. Then by section 8(1) :—

"The Board shall have and may exercise the following powers, namely —

(a) to hear and determine any application or proceeding for the purpose of fixing the rent in respect of a tenancy of premises;

(b) to make orders fixing such rent at a figure equal to, below or above the current rent as to the Board may seem just and proper; and, from time to time, to review, vary or set aside any order made by it, as provided in section 9 of this Ordinance;

....."

It is unnecessary here to deal with the remainder of the section except sub-section (2) which provides that where a landlord has since 25th September, 1940, incurred extraordinary expenditure on improvements of premises the Board shall in fixing the rent of such premises "take such expenditure into consideration so as to allow the landlord a reasonable return in respect thereof."

Finally, I refer to section 9 which gives the Board power to review its own orders in certain specified cases. The only ones of these which are of importance in the present connection are as follows :—

"9. (a) where the circumstances affecting the question of rent have materially altered since the order was made;

.....

(e) where, in the opinion of the Board substantial injustice has been occasioned by the order."

The 1948 Ordinance is to be read in the light of the 1940 Enactment. The object of the 1940 Enactment, generally speaking, was to maintain rents of premises completed before its commencement at a pre-war level and to limit the rent of premises completed after its enactment to a figure which would give a reasonable return for capital reasonably expended. The object of the 1948 Ordinance, generally speaking, was clearly to maintain the rent of premises completed before its enactment at the level laid down by the 1940 Enactment subject in cases where there had been no increase of rent since the commencement of the 1940 Enactment to certain percentage increases (section 6) and subject to a landlord being allowed a reasonable return in respect of improvements effected since the commencement of the 1940 Enactment.

In view, however, of the nature and extent of the powers given to Rent Assessment Boards

by the provisions of the Ordinance which have been quoted it is very doubtful whether the Ordinance as it stands gives effect to what were probably its objects as have been stated. It thus becomes necessary to consider the nature of these powers and the limits, if any, which the Legislature has placed upon their exercise.

As regards the nature of the Board's power there is little difficulty. The Board is not a Court of Law in the sense of being an organ of the State which can not only determine the rights of subjects but can also invoke the powers of the State to enforce compliance with its determinations. Nor has it any power to alter the terms of any contract. It has no power to fix rents in the sense of saying what rent shall be payable in respect of any particular premises. It has only power to make Orders fixing rents at a specified figure and when it has made any such Order then such Order becomes binding on the landlord and on the tenant and, indeed, on the world at large in relation to the premises (see section 8(8)) to the extent, but only to the extent prescribed by the Ordinance. If the rent fixed in the Order is higher than the current rent then if the current rent is payable by reason of a contract of tenancy the tenant cannot be deprived of the benefit of that contract and, in the absence of agreement, the only way in which the landlord can obtain the increased rent is to terminate the contract in accordance with its own provisions and on its termination either make a new contract at the increased rent or suffer the tenant to remain in possession at the new rent as a statutory tenant. If the tenant is not prepared to pay the increased rent he is not compelled to do so. It is open to him to quit the premises on the termination of the contract. In the case where at the time the Order is made the tenant has already for any reason ceased to be a contractual tenant and become a statutory tenant the effect of section 16 would appear to be to make a month's notice necessary before the landlord becomes entitled to the increased rent.

I pause at this stage to observe that these considerations make it abundantly clear that the Board has no power to qualify its Orders in any way by suspending their operation or, as has been done in the present cases, by making them retrospective. To make such an Order retrospective is in effect to alter the terms of a contract which *ex hypothesi* has been lawfully made or in the case of a statutory tenant to deprive him or his landlord as the case may be of the benefit of section 16. On this point, I have arrived at the same result, though for somewhat different reasons, as was arrived at by Hastings J. in the case of *Labrooy & Ors. v. S. M. Sharma*[2], a case which in the present proceedings the Board would seem to have thought itself at liberty to disregard.

I now pass to the question of the limitations, if any, which the Legislature has imposed upon the Board in relation to the exercise of its powers as I have thus described them. The exercise of these powers must be unlimited or it must be limited and if it is limited the limits must be found within the four corners of the Ordinance. Here I find myself in very great difficulties because having regard to the generally accepted limits of the human understanding the provisions of the Ordinance are not very clear.

It is probably true to say that the Ordinance provides for two sets of circumstances in which the Board may exercise its powers. There is the proviso to section 6(1) and then there are the provisions of sections 8 and 9.

As regards the proviso to section 6(1), this is clearly to be read in the light of the sub-section as a whole and has no application beyond the limits of the sub-section. That being so, I am of the opinion that its effect is the same as that of section 11(1) of the English Rent and Mortgage Interest Restrictions Act, 1923, which provides that the Court shall have power to determine summarily any questions as to the lawful amount of rent and so forth. The effect of that section of the English Act was thus described by Lord Greene M.R. in the case of *Griffiths v. Davies*[1], *supra*:—

> "Section 11 of the Act of 1923 merely provides convenient machinery for deciding questions as to (inter alia) the amount of the standard rent. It is an ancillary jurisdiction to enable the court to decide, without reference to any existing claim for rent or for possession, the question what is the rent which, having regard to the terms of the Acts, is legally exigible from the tenant."

The provisions of sections 8 and 9 are very different. The Board may make Orders fixing the rent of premises "at a figure equal to, below or above the current rent as to the Board may seem just and proper" and it may vary its Orders "where the circumstances affecting the question of rent have materially altered" or "where, in the opinion of the Board, substantial injustice has been occasioned" by any previous Orders made by it. The only other indication as to the principles on which it should exercise its discretion is found in section 8(2) which provides that where a landlord has since the commencement of the 1940 Enactment incurred expenditure on improvements (but not on decoration or ordinary repairs) the Board shall in fixing the rent of a tenancy of such premises take such expenditure into consideration so as to allow the landlord a reasonable return in respect thereof.

Here, the lawyer is in the position of the mariner who finds himself on a strange dark sea without chart or compass. When is a rent "just and proper"? What are "circumstances affecting the question of rent"? What, and here I echo jesting Pilate, is "substantial injustice"? In a world of changing currency value is a reasonable return on expenditure what would have been a reasonable return when the expenditure was incurred? Or is it what is a reasonable return at the time the question is considered by the Board? To these questions it is impossible to give anything like complete answers. It is difficult even to see where the answer is to be sought. It is probably not to be sought in any consideration of the personal circumstances of the landlord or the tenant for by section 8(8) an Order made by the Board is binding on all present and subsequent landlords and tenants. It might be thought that the answer was to be found in the commercial value of the premises from time to time, that is to say the rent which a willing tenant would be prepared to pay to a willing landlord. Here, again, there is difficulty. For if rents were to be fixed on this principle it is difficult to see the need for any sort of legislation at all. Again, it might be that an answer is to be found by considering what would be a reasonable return on capital. But here again there are difficulties. The starting point of all this legislation is rents prior to 25th September, 1940, and it is to be assumed that on that date rents which in the absence of any control were fixed by agreement did afford a reasonable return in respect of capital. But then there are the percentage increases provided by section 6 which on this basis might suggest that the Legislature intended to allow a greater return on capital than in 1940 but intended that that increased return should be confined within limits prescribed by itself. Thus the paradoxical position would be arrived at that as regards premises in existence before 1940 the allowed increase of capital return is restricted by the provisions of the Ordinance itself whereas in the case of any subsequent improvements to the same premises the Board has an unrestricted discretion to say what is a reasonable return.

In the event I have been compelled to a certain conclusion. It may be that the drafting of the Ordinance has been unskilful and that its words do not represent what was really intended. It may be that I have been in error as to the object of the Legislature and that its object in truth was while maintaining in general the sort of control of rents imposed by the 1940 Enactment to give Rent Assessment Boards power to modify or, in effect, to suspend its operation in their respective areas. It may be that all that was intended was to give the Board power to allow some increase in rent in the case of improvements. All that, however, is a matter of speculation and speculation in this case leads in such diverse directions that it is to be wholly shunned. All I can go on is the words as they are written and I return from my voyage over the uncharted seas I have described with the firm opinion that nowhere are there to be found any effective limitations on the extent of the exercise of its powers by the Board. The Board may embody in its Orders such amount by way of rent as to it may seem just and proper and, provided that it complies with the provisions of the Ordinance which I have not found it necessary to rehearse relating to interested parties being given an opportunity to state their cases and to produce such evidence as they may see fit, then in the absence of any allegation of want of good faith I do not see how its Orders can be successfully challenged in this Court.

I now return to the actual cases before me.

I have quoted the reasons for the decisions of the Board in these cases as stated by the President. If the President means by what he says that in every case and without consideration of any other facts the rent of premises should be fixed for the purposes of the Ordinance at exactly the same figure as has been arrived at as the value of the premises for rating purposes he is clearly wrong, for as Mr. Seenivasagam very rightly pointed out that would be tantamount to saying that the Board should disregard the circumstances of each individual case and in effect be guided blindly by the decisions of some other body.

From the actual course of the proceedings before the Board, however, it is by no means clear that the Board did apply any such principle nor was the application of any such principle necessary to enable it to arrive at the result at which it actually arrived. The landlord and the tenant were both represented before it. The only evidence which was tendered by either party was the evidence tendered by the landlord as to the increase in the rateable value and in the circumstances the only course open to the Board was to decide whether or not on that material it should make an Order fixing the rent at an increased figure and whether or not that increased figure should correspond with the figure of the rateable value. There was no question of disregarding other evidence, for there was no other evidence. In the circumstances, I do not think the President's words and, in particular, his use of the expression "tied" can be taken any further than an expression of opinion that the rateable value is something which the Board may consider in fixing rents for the purposes of the Ordinance and if that be so, and, if as is the case here, there is nothing else to

consider, I fail to see that the Board has gone outside its powers or has acted otherwise than judicially in basing its decision on that particular consideration. It may have attached undue weight to that particular sort of evidence but that is not a point on which its decision can be criticised here for the weight to be attached to any particular piece of evidence is essentially a question of fact and not a question of law.

For reasons which I have indicated earlier in this judgment so much of the Board's Order as purports to make that Order retrospective must be set aside as going beyond the Board's powers.

The appeal, however, against so much of the Order as purports to fix the figure of the rent must be dismissed with costs.

Order accordingly.

Solicitors: *S. Seenivasagam & Sons; Maxwell, Kenion, Cowdy & Jones.*

P. ODERNAMALL & CO. v. AMERICAN PRESIDENT LINES LTD. and PENANG HARBOUR BOARD (No. 1)

[O.C.J. (Spenser Wilkinson J.) October 7, 1955]

[Penang — Civil Suit No. 227 of 1951]

Carriage of Goods by Sea — Liability of shipowners for loss to cargo.

The plaintiffs in this case were the consignees of 28 cases of textile material shipped in Japan on board the s.s. "President Monroe" for delivery at Penang. The cases were in apparent good order and condition on shipment. During the course of discharge from the ship into lighters at Penang certain minor damage or defects in regard to 7 of the cases were noted by the tally clerk employed by the ship's agents. The goods were discharged in steel lighters belonging to the Penang Harbour Board and were discharged next day into one of the Harbour Board's godowns. On receipt of the packages in the godown a certain number of these cases were noted in the Godown Book as being subject to defects. Three days later the consignees having observed that some of the cases were not in good order called for a survey and upon survey it was found that five cases contained less than the number of pieces they should have contained, there being a total shortage of 121 pieces or 2,420 yards. The plaintiffs claimed in respect of this shortage against the shipowners on the ground that they had delivered the cases in a defective condition with a shortage of 121 pieces and alternatively for damages caused by the negligence of the shipowners, their servants or agents in or about the handling, storage, carriage, custody, care and discharge of the goods. The plaintiffs claimed in the further alternative against the 2nd defendants upon an implied contract to take care of the goods and deliver them to the plaintiffs or as bailees who failed to deliver the 28 cases intact.

Held: (1) on the facts the preponderance of evidence was in favour of the shortage having arisen at some period before the goods were discharged from the ship into the lighters; (2) in any event and assuming the finding in (1) to be wrong, if the cause of the damage has not been explained, the shipowners were liable; (3) there was no evidence that any further damage or loss occurred in respect of the goods during the period of storage in the godown nor that the goods were actually received by the Penang Harbour Board in good order and condition, and therefore the case against the 2nd defendants could not succeed.

Cases referred to in the judgment:—

(1) *The Ida* (1935) P. 134.

(2) *Chartered Bank of India v. B.I.S.N.* (1909) A.C. 369.

(3) *Gosse Millard v. Canadian Govt. Merchant Marine* (1927) 2 K.B. 433.

CIVIL SUIT.

S. Thillaimuthu for the plaintiffs: Claim against 1st defendants is damages for breach of contract under Bill of Lading dated 27th March, 1951; and a breach of duty in regard to carriage of goods. Against 2nd defendants breach of contract of bailment.

R. D. Hume for the 2nd defendants: Is my friend dropping his first claim which is as agents?

Thillaimuthu: I am not dropping that claim. Order placed for cloth from Japan late in 1950 — Firm of Itoh & Co. Shippers shipped 28 cases of these textiles under the Bill of Lading in "President Monroe" of which 1st defendants are owners. Sime Darby, agents for 1st defendants. Goods received on ship in good order and condition. Plaintiffs will rely on the estoppel arising from these words. Ship arrived 21st April. 2nd defendants were engaged to take delivery. Plaintiffs received a Delivery Order from agents and went to take delivery from the Harbour Board godowns. Some of the cases were damaged. They declined to take delivery. Survey made. Survey report in bundle Ex. A. It appears that five of the cases were found to have a shortage. Will be evidence of what cases contained when shipped. All except one which contained 62 held 50 pieces. Plaintiffs' claim is for the shortage. Defendants deny the shipment in good order and condition. They rely on two exceptions under Carriage of Goods by Sea Act. Art. 4 r. 2. Ordinance No. 13 of 1950. Clause 1 of Bill of Lading. Onus of proof — Once it is proved the goods shipped in good order and condition the consignee must succeed against the carrier unless he can show that the damage or loss is excused under the Ordinance. Once this is proved the onus shifts on to the 2nd defendants.

Hume: 2nd defendants are a statutory board constituted under Ports Ordinance (Cap. 149). S. 61(1) Power to make bye-laws. Bye-laws were in fact made. Have been approved and published in Gazette on 28th August 1914. Public can obtain copy on payment. First defendants admit they have a copy. For convenience I hand in a copy of the printed booklet of Bye-Laws. Bye-law 32 has as far as I can ascertain not been altered. Receipt in this case in accordance with that Bye-law. Carver's Carriage by Sea, 9th edition, page 706. 1st defendants sued in contract under Bill of Lading. 2nd defendants are sued in the alternative:— 1. That they received the cargo as agents of the plaintiffs. I wish to make it clear that 2nd defendants are not the agents of the plaintiffs.

Thillaimuthu: It means they became damaged during 2nd defendants' custody.

Hume: As bailees we would be liable in detinue if we detained and for negligence if we had committed a negligent act. But in both cases and subject to the terms of any contract which would exempt us from liability. I will submit later that 2nd defendants are exempted under the terms of the Bill of Lading which was not exhausted until delivery of goods to plaintiffs. We could in any event only be liable for goods actually received and in the condition in which we received them. As landing agents we are bound to receive all cargo handed to us in whatever condition, unless dangerous goods.